CA before Sir John Donaldson M.R. Dunn LJ and Browne-Wilkinson LJ. 17th February 1984

JUDGMENT : DUNN L.J.

1. This is an appeal from a judgment of Judge Smout Q.C. sitting as an official referee on 12 December 1983 whereby he dismissed the applications of the plaintiffs, Northern Regional Health Authority, for injunctions restraining the defendants, Derek Crouch Construction Co. Ltd. and Crown House Engineering Ltd., from seeking awards in two references to arbitration dated respectively 4 and 30 November 1983. The dispute arises in relation to the construction of a hospital at Barrow in Furness, and in particular to the installation and commissioning of the boilers. The plaintiffs (the health authority) were the building owners or employers, the first defendants (Crouch) were the main contractors and the second defendants (Crown) were one of a number of nominated sub-contractors. The contractual arrangements are contained in three relevant contracts. The first in point of time was an agreement dated 3 November 1977 (the warranty agreement) between the health authority and Crown made under clause 27(c) of the standard form of building contract issued by the Joint Contracts Tribunal (J.C.T.), 1963 ed. The second contract (the main contract) was dated 22 December 1977 between the health authority and Crouch made on the standard form of building contract issued by J.C.T., 1963 ed. The third contract (the sub-contract) was dated 15 May 1978, and was made as the result of an instruction by the architect to Crouch dated 9 December 1977 to enter into a subcontract with Crown for the installation of the mechanical services. Pursuant to that instruction the sub-contract was made on the standard form for use where the sub-contractor is nominated under the main contract.

2. Crouch took possession of the site on 13 February 1978 and the completion date for the whole of the main contract works was 10 November 1981. The sub-contract provided for the boilers to be operational by 5 October 1980, for Crown to complete the installation by 19 April 1981, and for a six months' commissioning period until 18 October 1981. It is common ground that the main contract works were very substantially delayed, the causes of which are in dispute. However, on 10 May 1983 the architect issued an instruction in accordance with clause 23(e) of the main contract stating that in his opinion the works had been delayed, and extending the contract completion date to 24 June. On 12 May 1983 the architect consented to an extension of time for completion of the sub-contract works down to the same date.

3. The sub-contract specification required the installation of three "***Cochrane Coalmaster***" boilers, which were delivered to the site in May 1980, but for various reasons were not brought into operation until December 1982. It was then found that the coal handling plant was incapable of dealing with the specified coal, "***Maryport Smalls***," because the aperture at the bottom of the bunker was too small, and the coal compressed in the bunker neck and blocked the system. On 21 February 1983 the architect issued an instruction (No. 861) requiring the use of a different coal, "***Bickershaw Singles***." It was not possible for Cochrane to adjust the boilers so that the heat output required by the specification was achieved with the "***Bickershaw Singles***," and on 14 June the architect notified Crouch by letter that: *"Boilers should be set to work at the optimum burning rate for the fuel referred to in architect's instruction no. 861 [to use Bickershaw Singles] ... commensurate with obtaining complete combustion of the fuel in the boilers."*

4. Following receipt of that letter, tests were carried out during July and on 30 September the architect wrote to inform Crouch (a) that the contents of the letter of 14 June did not amend his instruction no. 861; and (b) on the basis of the results of the tests with Bickershaw Singles the boilers as installed were not acceptable, and Crouch's proposals for remedying the situation were required. On 28 October the architect notified Crouch that the consulting engineers had advised them that the boiler installation was practically complete. The boiler house was handed over on 25 November 1983 and the final phase of the main contract was complete on 12 January 1984.

5. Meanwhile on 21 September 1982 Crouch issued a writ against the health authority claiming declarations as to entitlement to extensions of time, and reimbursement of loss and expense under the main contract by reason of matters occurring down to 31 July 1982. In those proceedings Crouch referred to claims which Crown had made against it, but Crown were not a party to the proceedings

and took no part in them. The health authority withdrew an application to stay the proceedings under section 4 of the Arbitration Act 1950, which had been opposed by Crouch on the ground, inter alia, that resolution of the very substantial claims by Crown and another sub-contractor, coupled with a claim of Crouch itself, would only be possible if one tribunal heard all matters. The proceedings were transferred to the official referee and an application for an interim payment was refused by Judge Sir William Stabb Q.C. on 30 March 1983. A date for the hearing has been fixed for February 1985.

6. On 27 July 1983 Crouch wrote to the health authority in the following terms: *"Please accept this letter as our formal notice of reference to arbitration under clause 35 of the contract between us on the following grounds. (1) Your expressed intention to deduct damages. (2) Your architect's failure to issue meaningful instructions to facilitate the completion of the boiler house which is in our opinion an essential prerequisite to the practical completion of the contract. (3) Your architect's refusal to grant further extension of time in relation to item no. 2 and various other matters."*

7. It was agreed that that dispute should be referred to Mr. Norman Royce, F.R.I.B.A., a most experienced arbitrator in this field, and it was also agreed that the terms of reference should expressly exclude the issue as to the boilers. As a result of that exclusion, Crown took no part in the reference, which was settled between the health authority and Crouch on 22 November 1983. One of the terms of the settlement was that there should be a further arbitration in relation to the boilers ("the boiler house dispute").

8. By letter dated 4 November 1983 Crouch applied under clause 35(1) of the contract to the president of the R.I.B.A. for an arbitrator to be appointed for the boiler house dispute, and on 11 November the president appointed Mr. Royce as arbitrator in that arbitration (the "Crouch arbitration"). The terms of reference were contained in a telex from Crouch dated 27 October and were as follows: *"(1) For what reason or reasons is the boiler plant inoperable in accordance with the conditions of the contract between the parties dated 22 December 1977, and the responsibility therefor? (2) Was the boiler house practically complete on 24 June 1983 and if not in what respect? (3) If the answer to (2) is No, did the works in the boiler house achieve practical completion at any time thereafter, and if so, when?"* The health authority agreed that paragraphs (2) and (3) should be referred to Mr. Royce, but disputed the reference of paragraph (1). On 30 November 1983 the health authority issued an originating summons seeking an injunction restraining Crouch from seeking an award in relation to any of the matters set out in paragraph (1) of the telex.

9. Meanwhile Crown wished to commence their own arbitration in relation to the boiler house dispute, and on 14 October 1983 Crouch notified Crown that they were free to proceed in Crouch's name in accordance with the terms of the sub-contract: see the proviso to clause 8(b), post, pp. 661G - 662A. On 10 November 1983 solicitors for Crown wrote to the health authority in the following terms: *"In conclusion, we think it would be convenient to set out the matters of dispute or difference which exist between DC (CHE) and the authority. They are:*

"A. The boilers can achieve the contractually specified outputs and efficiencies using 'Maryport Smalls' but the coal handling plant cannot deliver that fuel. The boilers cannot achieve those outputs and efficiencies using 'Bickershaw Singles' but the coal handling plant is able to deliver that fuel. Accordingly, the design team must decide which of the two alternatives they wish the sub-contractor to achieve. The design team's requiring 'experiments' to be carried out using ' Bickershaw Singles' without their then accepting the results by unequivocally amending the sub-contract specification is improper and unacceptable. Accordingly, the sub-contractor requires that the arbitrator should issue one or other of the following instructions - (1) An instruction confirming that the sub-contractually specified requirements as to boiler outputs and efficiencies have been varied to those achievable using 'Bickershaw Singles' as the fuel. Any such instruction must be given on appropriate terms bearing in mind the fact that this was not the intended fuel for these boilers. (2) An instruction to modify the fuel handling plant to some revised design which will enable 'Maryport Open Cast Smalls' to be conveyed to the boilers and to make the necessary re-adjustments to the boilers to enable them to achieve the contractually specified outputs and efficiencies with that fuel.

"B. A full extension of time for completion of the sub-contract works up to the following dates: (1) If an instruction under A(1) above is to be issued there should be an extension of time up to the date on which the

boilers are accepted as complete in their present tested state. (2) If an instruction under A(2) above is issued there should be an extension of time up to a date which allows a reasonable time for the works to be carried out after the necessary detailed instructions have been issued."

10. On 1 December 1983 the president of the R.I.B.A. appointed Mr. Royce as arbitrator in that arbitration (the "Crown arbitration") with terms of reference substantially as set out in the letter of 10 November.

11. On 6 December the health authority issued an originating summons seeking an injunction restraining Crouch and Crown from seeking an award in relation to any of the matters set out in those terms of reference.

12. In an affidavit sworn on 5 December 1983 Mr. Robson, solicitor to the health authority, stated: *"There is no dispute as to the cause of the problem, namely that the coal handling plant as a consequence of design defect would not operate with '**Maryport Smalls**.'"*

13. Both summonses were heard together by the official referee and he dismissed them both. It is accepted that he directed himself properly in accordance with authority (**The Oranie and The Tunisie** [1966] 1 Lloyd's Rep. 477, 487, *per* Sellers L.J.) and that he asked himself the correct questions, namely: (1) Would a stay of the references cause injustice to either of the claimants? and (2) Would the continuance of the references be oppressive or vexatious to the health authority or an abuse of the process of the court? What is said on behalf of the health authority is that the official referee in answering those questions in favour of Crouch and Crown misdirected himself as to the issues of fact between the parties, and that in exercising his discretion as he did he was plainly wrong.

14. The health authority submit, and it is accepted by Crouch, that the use of the word "***responsibility***" in paragraph (1) of the telex of 27 October would necessarily involve an investigation in the Crouch arbitration not only as to whether Crouch was entitled under clause 23 of the main contract to a further extension of time after 24 June 1983, but also whether Crouch was entitled to loss and expense under clause 24. The authority submit that those issues would involve opening up the causes of delay from inception of the works under the main contract, which it claims was largely the fault of Crouch, and would not confine the arbitration simply to the events relevant to the boiler house after 24 June. They submit that those issues, at any rate down to 21 September 1982 when Crouch issued its writ, are properly before the court in Crouch's action, and could easily be brought up to date by the issue of a new writ and consolidation of the two sets of proceedings. If the Crouch arbitration is allowed to continue with the inclusion of paragraph (1) of the telex in its terms of reference, then the health authority submit that there will be duplication or overlapping of many issues of fact which may, if the arbitration proceeds, give rise to issue estoppel in the action.

15. Crouch submits that further instructions with regard to the boiler house must be given, since the boiler is admittedly not in accordance with the specification due to a design defect. Once that instruction is given, the architect must grant an extension of time under clause 23(e) or (f) until such time as Crouch is able to comply with the instruction, and the instruction stating that the works ought reasonably to have been completed on 24 June 1983 must be set aside. If the arbitrator decides that an extension of time should be granted, he should also be empowered to decide, in principle, that Crouch is entitled to loss and expense under clauses 11(6) or 24(1) of the main contract. These issues can be decided now in the arbitration, and it will not be necessary to pursue all the other arguments and counter-arguments concerning the health authority's entitlement to damages for delay. If the arbitration goes forward, the issues in the action will be correspondingly reduced.

16. Similar issues arise in the Crown arbitration, but since the date of the judgment Crown have delivered particulars of claim which seek not only a decision in principle whether or not Crown are entitled to loss and expense, but also an investigation of the amount of loss and expense actually suffered. Mr. Reese, for Crown, admitted that these issues did not arise in terms on the present reference, but indicated that it would be his intention, if the arbitration proceeds, to refer them to the arbitrator and invite him to deal with them. The health authority has delivered points of defence alleging that any delay has been caused by the default of Crouch and to some extent of Crown, and opening up many of the issues which are the subject of the action.

17. The official referee took the view that the precise scope of the arbitration could be left to the arbitrator, that on the face of it there was no overlap with the action, but if there was he cautioned the arbitrator to tread carefully and seek to avoid any duplication of issues. The health authority submitted that in approaching the matter in that way the official referee erred in law, since the arbitrator was bound to decide the disputes referred to him, and to comply strictly with the terms of the references: see ***Russell on Arbitration***, 20th ed. (1982), p. 218.

18. I cannot accept that submission. There is no rule of law that an arbitrator must decide all matters in dispute between the parties. It is a matter of construction of the reference and the intention of the parties: see *per* Parke B. in **Wrightson v. Bywater** (1838) 3 M. & W. 199, 205-206. In this case the parties have agreed that some matters will be litigated and others arbitrated. There has already been one arbitration which resulted in a settlement. The health authority accept that there will be another arbitration to decide what, if any, further instructions are necessary in relation to the boiler plant. The sole issue is where the line should be drawn between the action and the arbitration. The arbitrator is in at least as good a position as a court to decide that issue so as to avoid any overlap, and to identify any genuine areas of overlap. There is no inherent objection to an action and an arbitration proceeding side by side: see **Lloyd v. Wright** [1983] Q.B. 1065.

19. On well-established principles an issue estoppel will arise from issues decided as the fundamental basis of an award in the Crouch arbitration, which will bind both Crouch and the health authority in the action. I do not see that the health authority will be prejudiced by this any more than Crouch. But the position in the Crown arbitration may be different. As I shall show, although under the sub-contract Crown proceed in the name and with the consent of Crouch, the issue may be different to the issues in the Crouch arbitration, and the proceedings will be in the interest of Crown and not in the interest of Crouch. Although issues which are common to both arbitrations and fundamental to both awards would in my judgment raise an issue estoppel as between Crouch and the health authority, there may be other issues relating only to Crown which would not raise an estoppel as against Crouch. But again I do not see any prejudice likely to be suffered by the health authority on this account.

20. One of the health authority's grounds of appeal is that the official referee erred in law in finding no objection to two separate references to arbitration. It was said that only disputes between Crouch and the health authority could be referred to arbitration, since any claim for a further instruction was a claim under the main contract and any claim for loss and expense suffered by Crown was subsumed in Crouch's claim for loss and expense. Accordingly the Crown arbitration should in any event be stayed.

21. This ground of appeal gave rise to a most interesting and able argument by Mr. Reese, which I gratefully accept. The argument may be summarised as follows. Although it is accepted that there is no privity of contract between the employer and the sub-contractor under the standard form of building contract and sub-contract issued by the J.C.T. (indeed clause 27(f) of the main contract expressly provides that nothing in the main contract shall render the employer in any way liable to any nominated sub-contractor), there are in the sub-contract elaborate arbitration provisions (clauses 7(2), 8(b) and 11(d)) which are complementary to the arbitration clause 35 in the main contract, and by clause 1 of the subcontract the sub-contractor is deemed to have notice of all the provisions of the main contract. The reason for these elaborate provisions is that although there may be a dispute between the main contractor and the sub-contractor, which would be referred to arbitration under clause 24 of the sub-contract, there may also be a dispute between the sub-contractor and the employer arising out of a decision of the architect as to the subcontract work, with which the main contractor is not at all concerned.

22. Take as an example one of the relevant clauses in this case, clause 8(b) of the sub-contract:

"Upon it becoming reasonably apparent that the progress of the sub-contract works is delayed, the sub-contractor shall forthwith give written notice of the cause of the delay in the progress or completion of the sub-contract works or any section thereof to the contractor, who shall inform the architect thereof and of any representations made to him by the sub-contractor as to such cause as aforesaid.

"If on such information and representation as aforesaid the architect is of the opinion that the completion of the sub-contract works is likely to be or has been delayed beyond the periods or period stated in Part II of the Appendix hereto or beyond any extended periods previously fixed under this clause, (i) by reason of any of the matters specified in clause 7(1) of this sub-contract or by any act or omission of the contractor, his sub-contractors his or their respective servants or agents; or (ii) for any reason (except delay on the part of the sub-contractor) for which the contractor could obtain an extension of time for completion under the main contract then the contractor shall, but not without the written consent of the architect, grant a fair and reasonable extension of the said periods for completion of the sub-contract works or each section thereof (as the case may require) and such extended period or periods shall be the period or periods for completion of the same respectively and this clause shall be read and construed accordingly.

"Provided always that if the sub-contractor shall feel aggrieved by a failure of the architect to give his written consent to the contractor granting an extension of the said period or periods for completion of the sub-contract works, then subject to the sub-contractor giving to the contractor such indemnity as the contractor may reasonably require, the contractor shall allow the sub-contractor to use the contractor's name and if necessary will join with the sub-contractor as plaintiff in any arbitration proceedings by the sub-contractor in respect of the said complaint of the sub-contractor."

23. The main contractor is required by clause 27(a)(v) and (d)(i) of the main contract to enter into a sub-contract which contains a clause similar to clause 8(b). Under clause 8(b) if the work is delayed the sub-contractor gives the main contractor written notice of the cause of the delay, and the main contractor is bound to inform the architect thereof and of any representations made by the sub-contractor. But it is the architect who has to form an opinion as to the delay and the reason for it. If he is of opinion that the delay warrants an extension of time and consents to such extension, then the contractor is bound to grant the extension, even though the delay may have been caused by the contractor himself. The contractor cannot grant an extension without the written consent of the architect. By the proviso, if the sub-contractor is aggrieved by a failure of the architect to give his consent, then the contractor is bound to allow the sub-contractor to use his name in arbitration proceedings against the employer under the main contract.

24. Similar provisions apply mutatis mutandis to variations (clause 7) and certificates of payment (clause 11). In each case the procedure is the same. The decision is made by the architect: the obligation of the contractor is confined to transmitting information from the sub-contractor to the architect, and carrying out the architect's decisions vis-à-vis the sub-contractor by delivering instructions or variations (clause 7); granting extensions of time (clause 8), and making payments under certificates (clause 11). So far as those clauses are concerned, the contractor acts as no more than a conduit pipe between the architect and the sub-contractor, and exercises no independent judgment of his own.

25. The reasons for these provisions arise out of the unique contractual relationships developed over many years by the J.C.T. and their predecessors in the standard forms of building contracts and sub-contracts. The scheme enables the building owner to deal with one main contractor instead of making separate contracts with specialists. But he has the right to decide which specialist the main contractor is to engage, and retains control through the architect over the amount paid to the specialist for his work. The main contractor, having on instructions entered into a subcontract with a nominated specialist, is required to pay the sums identified as having been included in the certificates issued to him by the architect in respect of the specialist's work. The main contractor is protected against claims for liquidated damages by the owner if the contract work as a whole is delayed by the specialist sub-contractor's failures. The architect is given power to control variations, the granting of extensions of time, and certificates of payment of the sub-contract work. The main contractor has no power to do any of these things.

26. Mr. Reese was unable to put any jurisprudential label upon the relations of the building owner, the main contractor and the sub-contractor. As I have said, there is no privity of contract between the owner and the sub-contractor, and save in two respects (clause 30(4) of the main contract and clause 11(h) of the sub-contract), the main contractor is not a trustee for either of them. But properly understood the scheme has the effect, while identifying the sub-contractor with the main contractor

for certain purposes, of recognising a separate identity in the sub-contractor for other purposes, and enabling him when he is in dispute with the decision of the architect to use the name of the main contractor in arbitration proceedings against the building owner.

27. Given the contractual arrangements in this case, in my judgment serious injustice would be caused to Crown were it enjoined from proceeding with its arbitration. Its dispute is with the architect, as agent of the health authority. It cannot sue the health authority direct in contract since there is no privity. Its only remedy at law would be to sue Crouch (with whom it has no dispute) for declaratory relief under clause 12 of the sub-contract requiring Crouch to obtain rights or benefits of the main contract applicable to the sub-contract. Crouch would then have to join the health authority in a dispute in which it was not or might not be concerned. This is a cumbersome procedure, and ignores the special arbitration machinery to which I have referred which was designed to deal with it.

28. Accordingly in my judgment the judge was right to hold that as a matter of law Crown had an independent right to use Crouch's name in arbitration proceedings against the health authority, and that such proceedings were not an abuse of the process of the court.

29. That is sufficient to dispose of this appeal but in the course of the hearing a further point arose which, if right, would further reinforce the view of the official referee. The point, put shortly, is that the court has no power to open up, review, or revise any certificate, opinion, or decision of the architect, since the parties have agreed by clause 35(3) of the main contract that that power shall be exercised exclusively by the arbitrator. A decision on the point is, as I have indicated, not necessary for the determination of this appeal, but in deference to the full arguments we have heard upon it I feel that I should deal with it. and if it is right it means that the court in the action would not be able to open up the architect's decisions, since the only way that could be done would be by arbitration.

30. Perhaps surprisingly there is no direct authority on the point which is binding on us, and we were told that it is common practice for official referees to open up and review certificates and other decisions of architects, a practice supported by the textbook writers on grounds of expediency and convenience. There are dicta of high authority either way. It was accepted in this court that the court retains ultimate control in seeing that the architect acts properly and honestly and in accordance with the contract: see **Hosier & Dickinson Ltd v P&M Kaye Ltd**. [1972] 1 W.L.R. 146, 157, *per* Lord Wilberforce, but reliance was placed on his obiter dictum, at p. 158: *"Had the matter gone to arbitration the position would no doubt have been different: this is because clause 35 of the contract confers very wide powers upon arbitrators to open up and review certificates which a court would not have."*

31. Reliance was also placed on **East Ham Corporation v Bernard Sunley & Sons Ltd**. [1966] A.C. 406, 424, 432, *per* Viscount Dilhorne and Lord Cohen respectively, whose obiter dicta reached the same result as Lord Wilberforce in **Hosier & Dickinson Ltd v P &M Kaye Ltd**. [1972] 1 W.L.R. 146, 158.

32. On the other side it was said that in order to give business efficacy to the contract there must be an implied term that if the parties litigate rather than arbitrate then the court shall have the same powers as the arbitrator: see **East Ham Corporation v Bernard Sunley & Sons Ltd.** [1966] A.C. 406, 447, *per* Lord Pearson. Reliance was also placed on the judgment of Judge Sir William Stabb Q.C. in the instant case given on 30 March 1983 when he held, following **Neale v Richardson** [1938] 1 All E.R. 753 and **Prestige & Co Ltd v Brettell** [1938] 4 All E.R. 346 that the court is invested with the same power as the contract bestows on the arbitrator, including the power to award any sum which ought to have been the subject of a certificate. In **Neale v Richardson** [1938] 1 All E.R. 753 the arbitrator (who was also the architect) had simply refused to arbitrate or issue a certificate, and it was held that the court could decide the amount due notwithstanding the absence of a certificate. It seems to me that this is an example of the court controlling the contract, and since the arbitrator had acted improperly the court assumed jurisdiction.

33. In my judgment it is not necessary to imply the term suggested in clause 35. The contract gives the architect wide discretionary powers as to the supervision, evaluation and progress of the works. The parties have agreed that disputes as to anything left to the discretion of the architect should be referred to arbitration, and clause 35 gives wide powers to the arbitrator to review the exercise of the

architect's discretion and to substitute his own views for those of the architect. Where parties have agreed on machinery of that kind for the resolution of disputes, it is not for the court to intervene and replace its own process for the contractual machinery agreed by the parties.

34. I am reinforced in my view by the relevant statutory provisions. By section 11 of the Arbitration Act 1950 the parties may agree that the reference shall be made to an official referee, and the practice is set out in R.S.C., Ord. 36, r. 5. If that course were taken, then the official referee would have all the powers of an arbitrator under clause 35.

BROWNE-WILKINSON L.J.

35. I agree that these appeals should be dismissed.

36. This court can only overturn the decision of the official referee not to exercise his discretion to stay the arbitration proceedings if the health authority demonstrates that the official referee misdirected himself or reached a wholly wrong conclusion. The health authority seeks to do this by showing that it is impossible for the arbitration to go forward without considering the reasons and responsibility for delays which occurred before 24 June 1983 and that accordingly the arbitrator will be bound to make decisions on these points which are the very points at issue in the High Court litigation. They say that, unless findings made in the arbitration give rise to an issue estoppel, this possibility of the same points being considered by separate adjudicators may lead to conflicting decisions. Moreover, they reasonably wish to have the matter decided in the High Court proceedings since only in such proceedings can they make third party claims against, for example, the architect.

37. These are formidable submissions and if the matter arose simply for decision as between Crouch and the health authority might well have succeeded: Crouch itself started the High Court proceedings and resisted the health authority's application to stay such proceedings; it is on weak ground in now insisting on arbitration which may raise overlapping issues.

38. But the issue does not arise solely between the health authority and Crouch. As Dunn L.J. has demonstrated, these contractual provisions place Crown in a most unusual position. As sub-contractors Crown have no direct legal rights as against the health authority: Crown's rights are against Crouch alone. Yet to the knowledge and at the instigation of the health authority the terms of the sub-contract are such that Crouch is a mere conduit pipe between the health authority and Crown. Crown is in fact largely controlled by the decisions and directions of the agent of the health authority, namely the architect. Although there is no way in which Crown can litigate directly against the health authority (since it has no legal right directly enforceable) the sub-contract provides machinery for a number of relevant disputes between Crown and the health authority to be decided by arbitration under the main contract by the device of Crown arbitrating in the name of Crouch. Since the health authority knew the terms of the sub-contract and directed Crouch to enter into it, the health authority cannot be heard to object to Crown arbitrating in Crouch's name pursuant to the provisions of the sub-contract.

39. The position, therefore, as between the health authority and Crown is quite different to that between the health authority and Crouch. Standing back from the technicalities of privity of contract, Crown in its own right has an overwhelming case to be allowed to go forward with its own arbitration. Only by such arbitration can it directly establish its rights against the health authority, and Crown, as opposed to Crouch, has never sought to have any of the issues litigated as opposed to arbitrated.

40. However, the technicalities of privity of contract cannot be ignored. Since, for some reason, the parties have chosen to cloak the reality of their commercial relationship in a particular legal guise, the court can only give effect to the legal relationships they have, to my mind unwisely, chosen to adopt, i.e. that Crown's "***rights***" against the health authority can only be established through Crouch. How far is it proper to treat Crown as having rights to arbitrate separate from those of Crouch? Can Crown have any better right than Crouch as against the health authority? As regards issues of fact or law decided in an arbitration at the instigation of Crown, will there be issue estoppel in the High Court action as between Crouch and the health authority? If there is no such issue estoppel, the same matters may

have to be litigated twice at great expense and with the risk of two inconsistent decisions on each issue.

41. These questions (which flow entirely from the unusual nature of the contractual arrangements the parties have adopted) are extremely difficult to answer in a way which gives effect both to the legal structure and to the commercial realities. In the event I find it unnecessary to reach any concluded view on them since in my view there are two factors which demonstrate that the official referee's conclusion was right.

42. First, I am not satisfied that there will necessarily be any overlap between the issues in the arbitration and the issues in the High Court proceedings. Crouch and Crown maintain that all questions of delay before 24 June 1983 are irrelevant to the claims they are seeking to arbitrate; the health authority contend that such earlier delays must directly arise. It is quite impossible to reach a concluded view on this point until the facts are known. But I am satisfied that Crown and Crouch have an arguable case that earlier delays are irrelevant. If they are right, the arbitration issues will not overlap and there is no reason why the arbitration should not continue. If, on the other hand, it emerges that the health authority are correct and that the earlier delays are relevant, I agree with Dunn L.J. and the official referee that in law the arbitrator is entitled to refuse to decide any issues which overlap with the High Court proceedings and that he is in the best position to decide whether such overlap does exist.

43. The second point was not considered by the official referee and only arose in the course of the hearing of this appeal. It is a point of general importance, namely will the High Court in the action have the same wide powers of re- opening and revising the opinions and certificates of the architect which are conferred on the arbitrator by clause 35(3) of the main contract? This is of direct importance to all the parties but in particular to Crown.

44. The importance of the point to Crown arises in the following way. It is a necessary part of their case that the correctness of certain certificates given and opinions expressed by the architect should be investigated and revised or amended. It is common ground that an arbitrator appointed under clause 35 of the main contract has power to do this. Clause 35(3) expressly provides that the arbitrator has power ***"to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given."***

45. If in any litigation the official referee also has such power, there is no problem. But if the official referee does not have such power, any injunction restraining the continuation of the arbitration proceedings would deprive Crouch (and through Crouch, Crown) of rights which they enjoy under the contract. So much is common ground.

46. What then are the powers of the official referee? It appears that there are two separate types of proceedings which may come before the official referee. First, the parties may by an arbitration agreement appoint the official referee as arbitrator under section 11 of the Arbitration Act 1950. If this is done, the official referee plainly has all the powers conferred on the arbitrator by the agreement of the parties. We were told that such a procedure is nowadays very rare. Secondly (and this is the normal case such as the present), one of the parties having started ordinary High Court proceedings, the court may refer the matter to the official referee. In such a case the powers of the official referee are regulated by R.S.C., Ord. 36, r. 4, which, in effect, confers on him all the powers of the court making the reference.

47. Accordingly, although the official referee's business is regarded as a special category of business and in practice official referees treat themselves as having jurisdiction to exercise all the powers conferred on an arbitrator by the standard form of building contract, the official referee can in fact have no wider powers than a judge of the Queen's Bench Division if an action relating to the building contract were to be heard by him.

48. In principle, in an action based on contract the court can only enforce the agreement between the parties: it has no power to modify that agreement in any way. Therefore, if the parties have agreed on a specified machinery for establishing their obligations, the court cannot substitute a different

machinery. So, in this contract the parties have agreed that certain rights and obligations are to be determined by the certificate or opinion of the architect. In an action questioning the validity of an architect's certificates or opinion given or expressed under clauses 22 or 23 of the main contract, in my judgment the court's jurisdiction would be limited to deciding whether or not the certificate or opinion was legally invalid because given, for example, in bad faith or in excess of his powers. In no circumstances would the court have power to revise such certificate or opinion solely on the ground that the court would have reached a different conclusion since so to do would be to interfere with the agreement of the parties.

49. The powers conferred on the arbitrator are of a different kind. Under clause 35(3) he has power not merely to determine disputes on legal rights under the earlier provisions of the contract (including the consequences flowing from certificates or opinions of the architect). In addition, he is given power to modify those contractual rights by varying the architect's certificates and opinions if he disagrees with them by substituting his own discretion for that of the architect. The arbitrator has power not only to enforce the contractual obligations but to modify them. His modifying power is by agreement conferred on a specified person, i.e. the person appointed arbitrator by agreement or by the president or vice-president of the R.I.B.A. In many cases such arbitrator would be an architect or engineer having specialist knowledge. The parties have never agreed to vest in the court power to vary their contractual obligations even if they could validly so agree.

50. Of course, the parties cannot by agreement oust the jurisdiction of the court to determine those matters within the court's jurisdiction, i.e. the enforcement of the contractual rights of the parties. But this does not mean that, if the court asserts its jurisdiction, it thereby assumes all the powers of the arbitrator including the power to modify the contractual obligations. The court is asserting the court's jurisdiction, not assuming the jurisdiction of the arbitrator. The court's jurisdiction does not include a right to modify contractual rights.

51. Therefore as a matter of principle I reach the conclusion that if this matter were to be litigated in the High Court (whether before the official referee or a judge) the court would not have power to open up, review and revise certificates or opinions as it thought fit since so to do would be to modify the contractual obligations of the parties. The limit of the court's jurisdiction would be to declare inoperative any certificate or opinion given by the architect if the architect had no power to give such certificate or opinion or had otherwise erred in law in giving it. The court could not (as an arbitrator could) substitute its discretion for that of the architect.

52. The position might well be different if the machinery in clause 35 had broken down and was incapable of operating. In such a case the agreement of the parties on a matter of machinery (as opposed to substantive obligation) having been frustrated, the court could and would substitute different machinery. But so long as the agreed machinery is workable, I can see no ground on which the court can alter the agreed machinery for establishing the contractual obligations.

53. These views accord with the approach and reasoning of the House of Lords in **Sudbrook Trading Estate Ltd v Eggleton** [1983] 1 A.C. 444 where the problem, though not the same as in the instant case, was analogous. Lessees had exercised an option to purchase at a price to be established by valuers, one of whom had to be appointed by the lessor. The lessor refused to appoint a valuer and contended that, as the price could not be ascertained, the exercise of the option had merely produced an unenforceable agreement to agree. The House of Lords held that the substantive obligation was to sell at a fair and reasonable price and that the provisions as to fixing that price were mere machinery. One party having wrongfully failed to operate the machinery, the court could substitute a different machinery to ascertain what was the fair and reasonable price. Lord Diplock plainly considered, at p. 479E-G, that the court could only use its own machinery to fix the price if the parties either could not insist, or were not insisting, on the agreed machinery being operated. Lord Fraser of Tullybelton, at p. 484, was also confining the cases in which the court could substitute different machinery to those where the contractually agreed machinery had broken down.

54. The judgments of Sir John Donaldson M.R. and Dunn L.J. demonstrate that there is no authority directly in point (apart from the decision of Judge Stabb) which shows that the view I have adopted is wrong. Indeed the weight of judicial dicta supports me in the view that I have formed.

55. I therefore reach the view that there are overwhelming reasons why Crown should not be prevented from pursuing its arbitration. If Crown is to arbitrate these points, in order to avoid difficult questions of issue estoppel it is obviously desirable that Crouch also should be free to arbitrate the same points before the same arbitrator. Accordingly I do not think it has been demonstrated that the official referee in this case erred in principle in refusing a stay of the arbitration proceedings and the appeals should be dismissed.

SIR JOHN DONALDSON M.R.

56. This appeal started as an appeal against a discretionary decision of Judge Smout Q.C. and it finished as such an appeal. But on the way it raised three questions of more than passing interest to those concerned with J.C.T. building contracts, namely (a) what is the status of a nominated sub-contractor who uses the name of the main contractor to make claims in arbitration against the building owner or, alternatively, that of the main contractor whose name is so used? (b) to what extent is the court entitled to exercise the powers granted to the arbitrator appointed under the main contract arbitration clause? and (c) to what extent is an arbitrator entitled to refrain from deciding issues referred to him? It also drew attention to the enormous workload of official referees and the consequent inevitable delays in disputes with which they are concerned.

The decision of Judge Smout Q.C.

57. The background to this dispute has been fully set out in the judgment of Dunn L.J. and I need do no more than summarise the reasons which the judge gave for refusing, in the exercise of his discretion, to grant a stay of either arbitration. These were:
    (i) There might well be no conflict between the two sets of proceedings, since the litigation as at present constituted concerned events prior to September 1982, whilst the delays complained of in the two arbitrations were later in date.
    (ii) If any application were made to up-date the litigation to take account of later events, the court could and would ensure that it did not enable the parties to re-open any issues already decided by Mr. Royce in the arbitrations.
    (iii) He had every confidence that Mr. Royce would seek to avoid any overlap between the matters with which he was concerned and those which were the subject matter of the litigation.
    (iv) Mr. Royce was fully capable of re-phrasing paragraph 1 of the terms of reference of the Crouch telex arbitration in order to make it clear that the issue was not who was responsible for the boiler plant being inoperable, but whether Crouch was so responsible.

58. Although he did not say so in terms, I think that it is a legitimate inference from the judge's judgment that he also took account of the fact that Mr. Royce was able to give the parties an appointment for a combined hearing or hearings in the middle of this month whereas, as I have already noted, the courts would consider the rights of Crouch at the earliest in 1985. He must also have taken account of the fact that Crown had at no time asked the courts to interest themselves in their claims, but instead had relied exclusively upon their contractual right to arbitration.

The extent of the potential conflict between the litigation and the arbitrations

59. I fully accept that the litigation as at present constituted cannot be concerned with events after September 1982 and, so far as such events are concerned, there can be no conflict. I also accept that if any attempt were made to up-date the litigation, either by amendment or by the issue of a further writ followed by an application to consolidate, the official referee would have ample discretionary power to ensure that no attempt was made to re-open issues already decided by Mr. Royce or indeed to explore issues which were under consideration by him.

60. I am less confident that the Crouch arbitration and also the Crown arbitration, if it were extended on the lines indicated in the pleading which they have delivered, might not involve an examination of events prior to September 1982. It is possible that the health authority might be minded to contend that there were two reasons why the boiler plant is inoperable. The first reason is likely to be that there

was an error in design, but a second reason which might be put forward is failures by Crouch which had delayed the performance of the contract and so had prevented the failure of design being detected and remedied at an earlier date.

61. Accordingly I examine the judge's decision on the footing that some conflict is possible. This raises several issues. (1) Is the jurisdiction of the official referee co-extensive with that of the arbitrator? (2) Could there be issue estoppel arising out of decisions by the arbitrator in (a) the Crouch arbitration, and (b) the Crown arbitration, which would affect the action before the official referee? (3) To what extent could this be avoided by restraint on the part of the arbitrator? (4) Can Crown litigate their claims separately from Crouch?

What is the jurisdiction of the official referee?

62. Under J.C.T. contracts the architect, who is the agent of the building owner, is a key figure in deciding such matters as what extensions of time should be granted for the performance of the contract, whether and to what extent contractors and sub-contractors are responsible for delay, how much each should be paid and when they should be paid and whether and when the works have been completed. These are very personal decisions and, within limits, different architects might reach slightly different conclusions. Despite the fact that the architect is subject to a duty to act fairly, these powers might be regarded as draconian and unacceptable if they were not subject to review and revision by a more independent individual. That process is provided for by the arbitration clause. It is, however, a rather special clause. Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called upon to find the facts, apply the law and grant relief to one or other or both of the parties. Under a J.C.T. arbitration clause (clause 35), the arbitrator has these powers but he also has power to "***open up, review and revise any certificate, opinion, decision, requirement or notice.***" This goes far further than merely entitling him to treat the arbitrator's certificates, opinions, decisions, requirements and notices as inconclusive in determining the rights of the parties. It enables, and in appropriate cases requires, him to vary them and so create new rights, obligations and liabilities in the parties. This is not a power which is normally possessed by any court and again it has a strong element of personal judgment by an individual nominated in accordance with the agreement of the parties.

63. This, of course, raises the vexed question of what happens if, instead of arbitrating, (a) one of the parties resorts to the courts and the application of the other party for a stay is refused or (b) both parties agree to waive their rights under the arbitration clause and to submit their dispute to the jurisdiction of the courts.

64. Somewhat surprisingly this has only once been the subject matter of decision by the courts. This was in an earlier round in the conflict between the health authority and Crouch in connection with the same contract when Crouch sought an interim payment. The decision was that of Judge Sir William Stabb Q.C. and was given on 30 March 1983. It is unreported. He held, on the authority of **Neale v Richardson** [1938] 1 All E.R. 753 that *"If the parties, as in this case, are able to choose the court as a forum for litigation rather than an arbitrator for arbitration, the court is invested with the same powers as the contract bestows upon the arbitrator and the court, after determining the issue, can give judgment for the payment of any money which that determination shows to be due."*

65. It should be added that this also reflects the practice of official referees.

66. In this appeal this issue has been much more fully argued and I am indebted to all counsel and, in particular, to Mr. Colin Reese, appearing for Crown, for the assistance which I have received.

67. In principle the exercise by a court of the powers conferred by the J.C.T. contract upon the arbitrator appointed for the purposes of that contract seems to me to involve the exercise of a completely novel jurisdiction. The function of the courts is to determine facts and to declare and enforce the contractual rights of the parties. It may be retorted that the same comment can be made about the functions of an arbitrator, and this I would accept. However, the truth of the matter is, I think, that the "arbitrator" appointed under a J.C.T. contract has a double function. He has first the right and the duty to review the architect's decisions (in which I include certificates, opinions, requirements and notices) and, if

appropriate, substitute his own. Second, he has to declare the rights of the parties on the basis of the situation produced by his own revising activity. The latter is truly an arbitrator's function. The former is not.

68. All this would be nothing to the point if the matter were governed by authority, but I do not think that it is. **Neale v Richardson** [1938] 1 All E.R. 753 is, I think, distinguishable. There the issue of the final certificate was a condition precedent to payment and the architect refused to issue the certificate. He was also the arbitrator under a straightforward arbitration clause reading "***in all cases arising out of this contract the decision of the architect shall be binding on all parties***" but he refused to act as such. The court, on the authority of **Brodie v Cardiff Corporation** [1919] A.C. 337 decided that the issue of a certificate by the architect as being a condition precedent to payment was subject to any decision by an arbitrator as to the rights of the parties. As the architect refused to act and neither party had taken any step to have another arbitrator appointed, the court was free to determine the rights of the parties without regard to the absence of a certificate. This seems to me to be very different from deciding that the court can substitute itself for the architect or exercise the powers of an arbitrator under a clause such as the J.C.T. clause. The court in **Neale v Richardson** [1938] 1 All E.R. 753 was merely performing its normal function, uninhibited by the absence of the certificate.

69. A similar example of the court's substituting its own machinery for contractual machinery which has broken down is provided by **Sudbrook Trading Estate v Eggleton** [1983] 1 A.C. 444. But this is wholly different from assuming a jurisdiction to take over and operate the contractual machinery which is not designed for use by a court.

70. **Prestige & Co Ltd v Brettel** [1938] 4 All E.R. 346, to which the judge also referred, is another example of the court applying **Brodie's case** [1919] A.C. 337 and holding that as arbitration had been claimed, the refusal by the architect to issue a certificate was not fatal to the contractors' claim. That has no bearing on the question of whether special powers given to the arbitrator can be exercised by the court.

71. Whilst, as I have said, the point does not appear to be governed by authority, it was considered in **East Ham Corporation v Bernard Sunley & Sons Ltd**. [1965] 1 W.L.R. 30 (C.A.) and [1966] A.C. 406 (H.L.(E.)) and in **Hosier & Dickinson Ltd v P&M Kaye Ltd**. [1972] 1 W.L.R. 146 (H.L.(E.)).

72. In the **East Ham** case the court was concerned with the conclusiveness of a final certificate by the arbitrator but also considered arguments based upon clause 27, the arbitration clause, which, it was contended, rendered the final certificate inconclusive. Salmon L.J. [1965] 1 W.L.R. 30, 41 appears to have accepted, although it was not necessary for the decision that a court would not be able to use the powers of the arbitrator under clause 35 (clause 27 in that contract) saying, at pp. 43-44: *"in an action (should the parties prefer litigation to arbitration) the judge would be bound by the final certificate, since on no view could the impact of clause 24 [the final certificate clause] be removed save by the powers conferred by clause 27 on the arbitrator and only on the arbitrator. I do not consider that* ***Robins v. Goddard*** *[1905] 1 K.B. 294 decides anything to the contrary."*

73. In the House of Lords Viscount Dilhorne did not find it necessary to deal directly with the point but did comment, at p. 424, that **Robins v Goddard** [1905] 1 K.B. 294 was not authority for the proposition that *"... if special powers are given to the arbitrator, they devolve on the court should there be litigation."* Lord Cohen (dissenting in the result) said, at p. 434: *"It was suggested in argument that if the matter came before the court the judge would have all the powers that an arbitrator would have under clause 27 and that therefore on the construction I have placed on the contract it is impossible to give any meaning to clause 24. This argument was based on the decision in* ***Robins v Goddard*** *[1905] 1 K.B. 294, but I agree with Salmon L.J. [1965] 1 W.L.R. 30, 44 that at a trial in court the judge would be bound by the final certificate since on no view could the impact of clause 24 be removed save by the powers conferred on an arbitrator and only upon the arbitrator.* ***Robins v Goddard*** *does not, in my opinion, decide anything to the contrary."*

74. Lord Pearson, at p. 447, expressed the view that there might be a contractual implication, in order to avoid absurdity, that the court had the same powers in an action as the arbitrator would have in an arbitration under clause 27 but did not decide whether there was such an implication saying only that

if there was not and one party brought an action, there would be very strong grounds for granting a stay of that action.

75. In **Hosier & Dickinson Ltd v P&M Kaye Ltd.** [1972] 1 W.L.R. 146 the question in issue was the evidential effect of a final certificate in relation to High Court proceedings begun before that certificate was issued. Lord Morris of Borth-y-Gest said, at p. 153: *"It is understandable that as the parties had contracted to refer disputes to arbitration they would not give a final certificate issued while arbitration proceedings were proceeding or pending the attribute of being ' **conclusive evidence**.' But they have not agreed that a final certificate issued while court proceedings are pending should not have the attribute*." and Lord Wilberforce said, at p. 158: *"Had the matter gone to arbitration the position would no doubt have been different: this is because clause 35 of the contract confers very wide powers upon arbitrators to open up and review certificates which a court would not have*."

76. I respectfully agree with Lord Wilberforce's dictum, but I should stress that my view relates only to the exercise by the official referee of his normal jurisdiction. Under section 11 of the Arbitration Act 1950: *"Where an arbitration agreement provides that the reference shall be to an official referee, any official referee to whom application is made shall ... hear and determine the matters agreed to be referred."*

77. R.S.C., Ord. 36, r. 5(2) and (3) also refer to this power. However, in the present case there was no such arbitration agreement which must, of course, be in writing: see section 32 of the Act of 1950.

Could there be issue estoppel arising out of decisions by the arbitrator?

78. In the case of the Crouch arbitration there can be no argument but that there can be issue estoppel which would affect the proceedings before the official referee.

79. In the case of the arbitration initiated by Crown in the name of Crouch, the same is true. Crown has no contractual rights under the main contract and is forced to claim in the name of Crouch under the rights given by them by clauses 8(b) and 11(d) of the sub-contract. The claims are therefore those of Crouch and issue estoppel could accordingly result. It was submitted that the status of Crown suing in the name of Crouch might be sui generis and that no estoppel would result, but I can see no basis for such a submission. Were it so, Crown would be suing in its own name under the main contract.

To what extent can the arbitrator refuse to decide issues?

80. This problem only arises in the unusual situation of concurrent overlapping proceedings before the court and before an arbitrator. The primary duty of an arbitrator is to decide all issues referred to him. However, an arbitrator is subject to the supervision of the court and it is well settled that the court has jurisdiction to restrain an arbitrator from deciding issues which are being litigated before the court. If, therefore, an arbitrator has reason to believe that he is being asked to decide issues which the court concurrently has under consideration, he should ask himself whether the court, if asked, would be likely to enjoin him from proceeding. If the answer is "***Yes,***" he should indicate his view and give the parties an opportunity of applying to the court for a mandatory injunction requiring him to proceed. If the answer is "***No,***" he should indicate his view and give the parties an opportunity of applying to the court for a prohibitory injunction restraining him from proceeding. This is analogous to the duty of an arbitrator when his jurisdiction is challenged. This does not mean that, whatever his view, the arbitration will grind to a halt. The arbitrator may be able to proceed with matters which create no risk of conflict or, if this is impossible and he thinks that the court would wish the arbitration to proceed, he can do so and only refrain from issuing his award until the wishes of the court are known.

Can Crown litigate their claims separately from Crouch?

81. There is no way in which Crown can litigate any claims under the main contract in their own name. Their only right is either to make claims against Crouch under the sub-contract, leaving it to Crouch to pass their claims on under the main contract, or to seek to use Crouch's name to claim under the main contract. The latter claim will be Crouch's claim and every conceivable complication will arise if Crouch disagree with the case which Crown wishes to submit in their name.

Conclusion

82. All parties concerned with the construction of this hospital - the health authority, Crouch and Crown - agreed to a system of disputes settlement which involved the appointment of an arbitrator under the

main contract with special powers and, if necessary, the appointment of an arbitrator, who would probably be the same individual, under the sub-contract. It is not surprising that problems are likely to arise if two of those parties - Crouch and the authority - first decide to abandon this system and litigate instead, then decide to revert to arbitration on a limited front, settle that arbitration whilst starting another and then fall out as to the scope of that other. Whilst it is a free country and they are entitled to do this, the one party thoroughly deserving of protection is Crown which is entitled to insist upon arbitration and to be protected from having its rights adversely affected by litigation, to which it has never agreed, under a jurisdiction which is probably more limited than that of an arbitrator. Against this background I should expect the arbitrator, Mr. Royce, to proceed with the arbitration with all expedition and the court, in the form of the official referee, to stand aside and leave him to do so. This clearly was in the mind of the official referee when he refused this application. The matter was one for his discretion and I can detect no error in the way in which he exercised it. I would go further and say that if I had to exercise the same discretion, which I do not, I would do exactly what he has done.

The state of the official referee's list

83. The delays in disposing of business before the official referees are, through no fault of theirs, wholly unacceptable. It may be that the indications which we have given that, in the absence of a written submission to arbitration, they do not have jurisdiction to exercise the powers of an arbitrator under clause 35, or its equivalent in other standard forms of contract, will reduce the length of the lists. I say this because our view, if accepted, will virtually give any party a right of veto on any attempt to bypass the arbitration clauses. They will be able to point out that they are thereby being deprived of the benefit of the special powers of the arbitrator under those clauses and they will accordingly have a very strong claim to a stay under section 4 of the Arbitration Act 1950 unless they voluntarily join in a submission to the official referee as an arbitrator. If this reduction in the length of the lists does not occur or seems unlikely to occur, urgent consideration should be given to conferring upon the official referees a power analogous to that contemplated by section 92 of the County Courts Act 1959 [power of judge to refer to arbitration] to enable the official referees, whether sitting as such or as arbitrators, to refer, or sub-refer, the "***nuts and bolts***" of the suit to a suitably qualified arbitrator for inquiry and report. This would result in the official referees becoming, in effect, the construction industry court, having the same relationship to the construction industry as the Commercial Court has to the financial and commercial activities of the City of London. It could decide questions of principle which are of general interest, leaving it to the individual arbitrators to apply those principles to the details of individual disputes.

84. For the reasons which I have sought to express, I would dismiss this appeal.

Appeal dismissed with costs. Leave to appeal refused. (A. H. R.)

Swinton Thomas Q.C. and David Blunt for the authority instructed by Ingledew Botterell Roche & Pybus, Newcastle-upon-Tyne; McKenna & Co.;
Colin Reese for Crown instructed by Bristows Cooke & Carpmael.